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Is the Law of War Changing in the Twenty-First Century?

Waseem Ahmad Qureshi

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DR. WASEEM AHMAD QURESHI*

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ABSTRACT

The main purpose of drafting the law of war was to maintain peace and security around the world. That is why the current legal framework prohibits the use of force, except in accordance with the right to self-defence or with United Nations Security Council (UNSC) authorization. Yet, this century has been in a perpetual state of war. In the past, there have been certain deviations from this proscription on the use of force through the introduction of notions like 'pre-emptive self-defence' and the 'responsibility to protect' (R2P), according to which states could use unilateral force against other states without UNSC authorization or without the occurrence of an armed attack, in the face of an 'imminent threat' to the 'security of humankind.' This Article aims to describe and assess the unable or unwilling doctrine, which is a framework that has been used on a number of occasions to justify a victim state's use of force against a host state in an effort to hunt down non-state perpetrators accused of waging attacks against the victim state. First, this Article discusses the notion of the responsibility to protect, commonly known as R2P, followed by the unable or unwilling test. Second, this Article discusses how this test arises and then explores the historic roots of the test. Third, this Article details the framework for applying the test, provides examples of real-world scenarios in which the test has been applied, and then critiques the application of the test in contemporary times. Finally, this Article concludes that the test is a broad interpretation of Article 51 of the United Nations (UN) Charter and deviates from the well-established law. However, it has not shifted the paradigm of law of war, as this test lacks legal conviction in the opinio juris and state practice and, hence, it is not considered a part of customary international law.

INTRODUCTION

Historically, the international community has effectively used religious,[1] scholarly,[2] customary, or contractual writings[3] in an attempt to limit human suffering, reduce the chaos of wars, and maintain the peace and security around the world. The governing law of war has evolved in many phases,[4] from permitting the fight of holy wars,[5] to permitting the hunt of terrorists who fight wars in the name of religion.[6] Similarly, world peace is strained where aggressors circumvent these restraints by forcefully initiating national and international wars in an attempt to satisfy their need for power and wealth.[7] Millions of people have been killed and many countries have been destroyed throughout the centuries as a result of men fighting wars against other men.[8]

The UN Charter[9] and humanitarian laws[10] have evolved as a legal framework for war, based largely on the desire to maintain international peace and order. These laws attempt to answer convoluted questions such as: "is the use of force against civilians justifiable in war?"[11] Under the

1. MARK J. ALLMAN, WHO WOULD JESUS KILL?: WAR, PEACE, AND THE CHRISTIAN TRADITION 121 (Leslie M. Ortiz et al. eds., 2008).
2. THE POLITICS OF ARISTOTLE 317 (Ernest Barker trans., 1971); *see also* CICERO DE OFFICIIS 45 (Walter Miller trans., 1913); *see also* WASEEM AHMAD QURESHI, THE USE OF FORCE IN INTERNATIONAL LAW 40 (2017).
3. *See generally* League of Nations Covenant arts. 1–26; General Treaty for Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57 [hereinafter Kellogg-Briand Pact]; U.N. Charter.
4. *See generally* League of Nations Covenant, *supra* note 3; Kellogg-Briand Pact, *supra* note 3; U.N. Charter, *supra* note 3; *see also* ALLMAN, *supra* note 1; ARISTOTLE, *supra* note 2; CICERO DE OFFICIIS, *supra* note 2; QURESHI, *supra* note 2.
5. ALLMAN, *supra* note 1.
6. *See* JAMES CORUM, FIGHTING THE WAR ON TERROR: A COUNTERINSURGENCY STRATEGY 39 (2007).
7. DANIEL BULTMANN, INSIDE CAMBODIAN INSURGENCY: A SOCIOLOGICAL PERSPECTIVE ON CIVIL WARS AND CONFLICT 7–8 (2016).
8. Douglas P. Lackey, *Pacifism*, *in* JAMES E. WHITE, CONTEMPORARY MORAL PROBLEMS: WAR, TERRORISM, AND TORTURE 17 (3d ed. 2008).
9. *See generally* U.N. Charter, *supra* note 3.
10. *See generally* The Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316; Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol II]; Rome Statute of the Int. Criminal Court, U.N. Doc. ACONF. 183/9 (July 17, 1998).
11. Additional Protocol II, *supra* note 10, art. 13.

current legal framework, the use of force is completely prohibited.[12] Two exceptions to this rule exist: (1) first, where use of force is necessary in order to exercise of the right to self-defence;[13] and (2) second, where the use of force is authorized by the UN Security Council (UNSC).[14] Originally, the main purpose for developing the laws of war was to limit the use of force and safeguard peace.[15] Paradoxically, the previous century has been in a perpetual state of war.[16] The past couple decades have witnessed various unilateral uses of force in many countries in the form of humanitarian interventions[17] and the War on Terror,[18] especially against non-state actors (NSAs) residing in innocent or neutral states, although the law remains ambiguous on this issue. Therefore, while briefly exploring the historical transformation of the laws of war, this Article seeks to answer three main questions. First, whether the law of war is changing in the twenty-first century. Next, what the current legal framework says about using force in self-defence against NSAs residing in an innocent state. Finally, whether the "unwilling and unable test" can be considered part of the current customary international law (CIL) of war.

Accordingly, this Article is divided into five sections. Part I will briefly illustrate the historical transformation in the law of war. Part II will then describe the current legal framework regarding the use of force under the UN Charter. Part III will list certain deviations from the current legal framework, including anticipatory self-defence, "right to protect" (R2P), and the "unwilling and unable test." Subsequently, Part IV will explore legal prerequisites applicable to the test. Finally, Part V will analyse whether the test can be considered CIL, answering the question of whether the law of war is changing in the twenty-first century.

I. HISTORICAL TRANSFORMATION

The historical transformation of the law of war can be divided into three periods: (1) the just war period from 330 BC to AD 1650; (2) the sovereignty period from 1700 to 1919; and (3) the international agreements period from 1919 to 1939.

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12. U.N. Charter art. 2, ¶ 4.
13. *Id.* art. 51.
14. *Id.* arts. 39–42.
15. *Id.* at pmbl.
16. GAY MORRIS & JENS RICHARD GIERSDORF, CHOREOGRAPHIES OF 21ST CENTURY WARS 2 (2016).
17. *See generally* TAYLOR B. SEYBOLT, HUMANITARIAN MILITARY INTERVENTION: THE CONDITIONS FOR SUCCESS AND FAILURE (2007).
18. *See* CORUM, *supra* note 6.

A. Just War Period (330 BC to AD 1650)

The just war period consists of three phases, namely the "Classical, Christian and Secular phases."[19] Throughout each phase, the theories and practices of different rationales varied with respect to where wars were permitted for certain just causes. For instance, during the classical phase (330 BC to AD 300), Greek and Roman philosophers,[20] including Aristotle[21] and Cicero,[22] proclaimed that wars were a means of peace.[23] Such philosophers also considered fighting against slavery,[24] fighting to enslave people,[25] and fighting to exercise leadership[26] as just causes for waging a war.[27] The Christian phase (AD 300 to AD 1550) followed this approach to just war, using the methodology that only a holy war ordained by a divine entity permitted the use of force.[28] Later, Augustine[29] and Aquinas[30] developed the rules and limitations of using force within this era. In this phase, amending wrongs, such as wars of revenge, were considered a just cause to wage a war.[31] To be considered a permissible justification for waging war,[32] such action required just intentions[33] by a rightful leader.[34] This requirement ruled out the possibility of waging holy wars without state authority.[35] Later, in the secular phase (AD 1550–1700), based on Grotius's works of

19. WASEEM AHMAD QURESHI, JUST WAR THEORY AND EMERGING CHALLENGES IN AN AGE OF TERRORISM 34–42 (2017).
20. QURESHI, *supra* note 2.
21. ARISTOTLE, *supra* note 2.
22. *See* CICERO DE OFFICIIS, *supra* note 2, at 83*; see also* QURESHI, *supra* note 2.
23. *See* ARISTOTLE, *supra* note 2; CICERO DE OFFICIIS, *supra* note 2, at 83; QURESHI, *supra* note 2.
24. ARISTOTLE, *supra* note 2, at 319.
25. *Id.*
26. QURESHI, *supra* note 2; ARISTOTLE, *supra* note 2, at 319.
27. QURESHI, *supra* note 2; *see also* ARISTOTLE, *supra* note 2.
28. ALLMAN, *supra* note 1.
29. Wim Smit, *Beyond Paralysing Fear and Blind Violence. Terrorism, Counter-Terrorism and the Violation of Human and Civil Rights*, *in* JUST WAR AND TERRORISM: THE END OF THE JUST WAR CONCEPT? 107–09 (Wim Smit ed., Peeters Publishers 2005).
30. AQUINAS: SELECTED POLITICAL WRITINGS 159 (A. P. d'Entrèves ed., J. G. Dawson trans. 1970).
31. *Id.*
32. *Id.* at 161.
33. *Id*. at 159.
34. Smit, *supra* note 29.
35. AQUINAS: SELECTED POLITICAL WRITINGS, *supra* note 30, at 159–61.

natural laws, wars were permissible for avenging wrongs,[36] or in self-defence and anticipatory self-defence by a lawful authority.[37] In this context, wars were meant to protect property and lives of people, and anticipatory self-defence mandated that there be an imminent threat to justify an anticipatory use of force.[38] In this secular phase, desires for "richer lands," "freedom" (among certain people), and "ruling other people" were considered unjust causes for a war.[39]

B. Sovereignty Period (1700 to 1919)

This period introduced the concept of sovereignty. It considered all countries to be equal[40] to one another and no country was subjected to higher laws without their consent.[41] In this period, all states could use force at whim,[42] owing to their sovereign rights to wage war[43] without any justification.[44] Uses of force short of war[45] were frequently used in this era in the form of reprisals and self-defence.[46] However, the Second Hague Convention prohibited the use of force for collecting debts as the only prohibition on using force by a state.[47]

C. International Agreements Period (1919 to 1939)

This period includes the Covenant of the League of Nations and the Kellogg–Briand Pact. After the consequences of the First World War, "the Covenant" (1919 to 1928), signed by 63 member countries,[48] posed certain restrictions on the use of force.[49] Yet, powerful states like the United

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36. ANTHONY CLARK AREND & ROBERT J. BECK, INTERNATIONAL LAW & THE USE OF FORCE: BEYOND THE UN CHARTER PARADIGM 15 (Routledge Press 1993) (2014).
37. HUGO GROTIUS, THE LAW OF WAR AND PEACE (DE JURE BELLI AC PACIS) 169–86 (Louise R. Loomis trans., 1949).
38. *Id.* at 173.
39. *Id.* at 550–51.
40. CHRISTOPHER C. JOYNER, INTERNATIONAL LAW IN THE 21ST CENTURY: RULES FOR GLOBAL GOVERNANCE 51 (2005).
41. AREND & BECK, *supra* note 36, at 16.
42. *Id.* at 17.
43. DJURA NINCIC, THE PROBLEM OF SOVEREIGNTY IN THE CHARTER AND IN THE PRACTICE OF THE UNITED NATIONS 52 (1970).
44. AREND & BECK, *supra* note 36, at 17.
45. BEOMCHUL SHIN, INTERNATIONAL LAW AND THE USE OF FORCE: SHAPING THE UN CHARTER AND ITS EVOLUTION 122 (Kida Press 2008).
46. QURESHI, *supra* note 19, at 45–48.
47. DIMITRIOS DELIBASIS, THE RIGHT TO NATIONAL SELF-DEFENSE: IN INFORMATION WARFARE OPERATIONS 98 (2007).
48. League of Nations Covenant, *supra* note 3, at art. 1, annex.
49. JOHN NORTON MOORE ET AL., NATIONAL SECURITY LAW 52 (2d ed. 2005).

States (U.S.) remained non-parties to the Covenant.[50] The Covenant made it mandatory to seek arbitration on disputed matters between states that could possibly lead to war,[51] and it prohibited the use of force against recommendations made by its report or court.[52] However, the parties could resort to using force in this era if the council did not reach a decision,[53] or if the other parties did not abide by the decision within three months.[54] Later, the signing of the Kellogg-Briand Pact (1928 to 1939) completely outlawed wars without providing any exceptions to it.[55] The notion of self-defence and its prerequisites were not defined or understood under this pact, which did little to restrict aggressive states and led to the Second World War.[56]

II. CURRENT LEGAL FRAMEWORK

Currently, the governing law of war is the UN Charter of 1945, which completely prohibits the use of force. Article 2(4) of the UN Charter reads, "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[57] However, the UN Charter provides only two exceptions to this prohibition on the use of force. The first exception is the use of force in self-defence. Article 51 of the UN Charter reads:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.[58]

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50. KAREN A. J. MILLER, POPULIST NATIONALISM: REPUBLICAN INSURGENCY AND AMERICAN FOREIGN POLICY MAKING 1918–1925, at 1 (1999).
51. League of Nations Covenant, *supra* note 3, art. 12.
52. *Id.* arts. 13, 15.
53. *Id.* art. 15.
54. YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 75 (Cambridge University Press 3d ed. 2001) (1988).
55. *See* Kellogg-Briand Pact, *supra* note 3, art. 1–2.
56. QURESHI, *supra* note 19, at 55–56.
57. U.N. Charter, *supra* note 3, art. 2, ¶ 4.
58. *Id.* art. 51.

The second exception to the use of force is through a United Nations Security Council (UNSC) authorization in accordance with Articles 39-41 of the UN Charter, in cases of a "threat to the peace, breach of the peace or act of aggression."[59] Article 39 of the UN Charter reads, "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."[60] Therefore, presently there is no third exception to the prohibition on the use of force against the sovereignty of another state. That is why all the unilateral uses of force in the absence of self-defence or UNSC authorization are considered illegitimate in accordance with the contemporary law of war.[61]

III. DEVIATIONS FROM THE FRAMEWORK

For the purposes of this Article, to explore deviations from the current legal framework, this part will only discuss the notions of pre-emptive self-defence, "R2P" and the "unwilling or unable test."

A. Pre-emptive Self-Defence

The *Caroline* Test of the nineteenth century, affirmed by the Nuremberg Tribunal, allowed the pre-emptive use of force in cases of necessary self-defence against a force that is "instant, overwhelming, and leaving no choice of means, and no moment for deliberation,"[62] without the occurrence of an actual armed attack. The test acknowledged the right of a State to strike first in cases of imminent attacks, but required that the use of pre-emptive force must be necessary and proportional.[63] The test essentially means that an imminent attack leaves no time for deliberations of using peaceful means but the use of force is allowed if it is proportional to the imminent threat.[64] Since 1967,[65] scholars have debated whether presently, the pre-

59. *Id.* art. 39–41.
60. *Id.* art. 39.
61. SPENCER ZIFCAK, UNITED NATIONS REFORM: HEADING NORTH OR SOUTH? 85 (2009); *see also* LEGITIMACY AND DRONES: INVESTIGATING THE LEGALITY, MORALITY AND EFFICACY OF UCAVS 28 (Steven J. Barela ed., 2015); THE ARAB SPRING: NEW PATTERNS FOR DEMOCRACY AND INTERNATIONAL LAW 72 (Carlo Panara & Gary Wilson eds., 2013).
62. William K. Lietzau, *Old Laws, New Wars: Jus ad Bellum in an Age of Terrorism*, 8 MAX PLANCK Y.B. U.N. L. 383, 440 (2004).
63. John F. Murphy, *Is US Adherence to the Rule of Law in International Affairs Feasible?*, *in* INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES ESSAYS IN HONOR OF YORAM DINSTEIN 197, 207 (Michael N. Schmitt & Jelena Pejic eds., 2007).
64. Lietzau, *supra* note 62; *see also* Murphy, *supra* note 63.
65. KINGA TIBORI SZABÓ, ANTICIPATORY ACTION IN SELF-DEFENCE: ESSENCE AND LIMITS UNDER INTERNATIONAL LAW 146–47 (2011).

emptive use of force is a part of CIL.[66] Therefore under this test, states can resort to the pre-emptive use of force without the occurrence of an armed attack in a situation of an imminent threat, but the use of anticipatory force must be necessary and proportional in accordance with the test.[67]

1. Case Studies

Aggressive states have used this narrative and started to use force pre-emptively without the occurrence of an armed attack to respond against their perceivable "future but imminent" threats. For instance, in 1967 Israel attacked the United Arab Republic without the occurrence of any armed attack.[68] In the Security Council debates, Israel argued that an army of 80,000 men and 900 tanks was assembling in Sinai to attack Israel.[69] Therefore, Israeli actions were necessary to thwart the imminent aggression against it.[70] In this debate, Syria maintained that Israel alone was the aggressor in this situation, and that it had also attacked and bombed Egypt and Syria, killing civilians and destroying property, without the occurrence of any attack on Israel.[71] In the same debate, Morocco argued that the mere preparation of military assembly cannot constitute aggression, but the first strike rule can.[72] The narratives of Syria and Morocco relied on the prohibition of the use of force, well maintained under the UN Charter. But the Israeli narrative relied only on a letter of a professor.[73] Against this, the Soviet Union responded that it was not a question of research, but a simple matter of fact that Israel conducted aggression against its neighbouring Arab countries.[74] The Soviet Union also maintained that the aggressor is the one who strikes first, and therefore Israel was the aggressor in this case.[75] Even the United States and Britain (which are major supporters of Israel) remained

66. *Id.* at 282–83.
67. Murphy, *supra* note 63.
68. AREND & BECK, *supra* note 36, at 76 (referencing Statement of Mr. Eban, U.N. Doc. S/OV.1348: 71).
69. *Id.*
70. *Id.*
71. *Id.* at 76.
72. *Id.* at 77 (referencing Statement of Mr. Benhima of Morocco, U.N. Doc. S/PV. 1348: 122).
73. *Id.* (referencing Statement of Mr. Rafel of Israel, U.N. Doc. S/PV.1353: 56–57).
74. *Id.* (referencing Statement of Mr. Fedorenko of the Soviet Union, U.N. Doc. S/PV. 1351: 76–80).
75. *Id.* (referencing Statement of Mr. Fedorenko of the Soviet Union, U.N. Doc. S/PV. 1351: 61).

silent on this debate.[76] It was overwhelmingly apparent in this debate that in practice under CIL, whoever strikes first would be considered an aggressor, and there is no room for accommodating anticipatory self-defence.

Again in 1981, Israel justified its attacks in Iraq by relying on its right to pre-emptive self-defence based on the theoretical works of Professor Bowett.[77] Israel argued that Iraq was building nuclear weapons, which were set to be operational in few days, and Iraq would not hesitate to use them against Israel in populated areas.[78] Therefore, owing to this imminent threat, Israel had to use pre-emptive force against Iraqi future aggression. The narratives of Iraq,[79] Syria,[80] Guyana,[81] "Pakistan, Spain and Yugoslavia"[82] supported the restricted view that use of force requires an armed attack to use force in self-defence.[83] Therefore, any pre-emptive use of force is aggression.[84] Similarly, Britain argued that Israeli actions were acts of aggression because there was no armed attack and the Israeli claim had no force in international law.[85] The international community, including the UNSC, condemned Israel's pre-emptive use of force[86] as a violation of the UN Charter.[87] Today, most countries condemn anticipatory self-defence owing to its propensity to invite abuse.[88] Similar to the narratives of these states, the International Court of Justice (ICJ) also substantiated the fact in the *Nuclear Weapon Opinion*, that the use of force in self-defence requires the occurrence of an armed attack.[89]

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76. *Id.* at 77.

77. *Id.* at 78 (referencing Statement of Mr. Blum, U.N. Doc. S/PV.2280 (June 12, 1981: 52).

78. David K. Shipler, *Israeli Jets Destroy Iraqi Atomic Reactor; Attack Condemned by U.S. and Arab Nations*, N.Y. TIMES (June 9, 1981), https://www.nytimes.com/1981/06/09/world/israeli-jets-destroy-iraqi-atomic-reactor-attack-condemned-us-arab-nations.html [https://perma.cc/24LR-ZCKC].

79. AREND & BECK, *supra* note 36, at 77–78 (referencing Statement of Mr. Hammadi, U.N. Doc. S/PV.2280 (June 12, 1981: 16).

80. *Id.* at 78 (referencing Statement of Mr. El-Fattal, U.N. Doc. S/off/Rec.2284 (June 16, 1981: 6).

81. *Id.* (referencing Statement of Mr. Sinclair, U.N. Doc. S/PV.2286: 11).

82. *Id.* at 78.

83. *Id.*; *see also id.* (referencing Statement of Mr. El-Fattal, U.N. Doc. S/off./Rec. 2284 (June 16, 1981: 6); *id.* (referencing Statement of Mr. Sinclair, U.N. Doc. S/PV.2286: 11).

84. *Id.* at 78.

85. *Id.* (referencing Statement of Sir Anthony Parsons, U.N. Doc. S/PV.2282: 42).

86. S.C. Res. 487 (June 19, 1981).

87. BELINDA HELMKE, UNDER ATTACK: CHALLENGES TO THE RULES GOVERNING THE INTERNATIONAL USE OF FORCE 154 (2010).

88. CARLO FOCARELLI, INTERNATIONAL LAW AS SOCIAL CONSTRUCT: THE STRUGGLE FOR GLOBAL JUSTICE 368 (2012).

89. *Id.*

2. Analysis

The present legal framework in Article 51 of the UN Charter clearly requires that use of force is only justifiable in self-defence situations where an "armed attack occurs."[90] Based on this explicit answer in the UN Charter, restrictionist scholars, including Brownlie,[91] Dinstein,[92] Henkin[93] and Jessup,[94] concluded the present legal framework does not allow the pre-emptive use of self-defence, and allows self-defence only once an armed attack occurs.[95] Counter-restrictionist scholars, including Bowett[96] and O'Brien,[97] argued that the use of word "inherent" in Article 51 meant to include the pre-existing CIL of self-defence, such as anticipatory self-defence.[98] Therefore, according to counter-restrictionists, Article 51 itself allows anticipatory self-defence.[99] The ICJ, in the *Nicaragua* case, clarified that the word "inherent" in Article 51 only applies to the occurrence of an armed attack.[100] Similarly, the drafters of the UN Charter clarified that the use of force in self-defence is limited to the occurrence of an armed attack, and does not include pre-emptive self-defence, by stating that, "[w]e did not want exercised the right of self-defence before an armed attack had occurred."[101]

Therefore, the restrictionist argument seems stronger, while the counter-restrictionist argument appears to be far-fetched and lacking evidence. As a result, today, most scholars and the international community consider pre-emptive self-defence unlawful[102] because for them, pre-emptive self-defence—

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90. U.N. Charter, *supra* note 3, art. 51.
91. *See* IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 275–78 (1963).
92. DINSTEIN, *supra* note 54, at 173–74.
93. LOUIS HENKIN, HOW NATIONS BEHAVE 140–44 (2d ed. 1979).
94. PHILIP C. JESSUP, A MODERN LAW OF NATIONS: AN INTRODUCTION 166 (1968).
95. AREND & BECK, *supra* note 36, at 73.
96. D. W. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 184–93 (Frederick A. Praeger, Inc., Publishers 1958) (1958).
97. William V. O'Brien, *International Law and the Outbreak of War in the Middle East*, 11 ORBIS 692, 698–99 (1967).
98. BOWETT, *supra* note 96, at 184–93; *see also* O'Brien, *supra* note 97, at 721.
99. AREND & BECK, *supra* note 36, at 73.
100. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 176 (June 27).
101. NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 56 (2010).
102. DINSTEIN, *supra* note 54, at 168; *see also* BROWNLIE, *supra* note 91, at 275; CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 133–34 (3d ed. 2008).

without the occurrence of an armed attack—is prone to inaccuracy and has room for abuse, which is an excuse for aggression.[103] For example, there are two main issues with the notion of the pre-emptive use of force. First, there is a possibility that a state can miscalculate the threat and assume fictitious threat based on misjudged or faulty information/assessment.[104] Second, the international community has no way of judging the evidence beyond any reasonable doubt or ascertaining whether there was an imminent threat.[105]

B. Responsibility to Protect (R2P)

R2P is a principle allowing the unilateral use of force[106] by a governing state,[107] other states[108] or the international community[109] to protect civilians from "genocide, war crimes, ethnic cleansing and crimes against humanity"[110] for humanitarian purposes. In this century, the UNSC has frequently relied on the notion of R2P.[111] For example, the UNSC authorized the use of force by upholding the principle of R2P through numerous resolutions including: 1674 (2006), 1894 (2009), 1996 (2011), 2014 (2011), 2085 (2012), 2117 (2013), 2121 (2013), 2139 (2014), 2149 (2014), and 2150 (2014).[112] Similarly, numerous countries have also used unilateral force against other states, as humanitarian intervention under R2P without UNSC authorization or without the occurrence of an armed attack, through military alliances such as the North Atlantic Treaty Organization (NATO).[113]

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103. DINSTEIN, *supra* note 54, at 168; *see also* BROWNLIE, *supra* note 91, at 275; GRAY, *supra* note 102.

104. DANIEL JOYNER, INTERNATIONAL LAW AND THE PROLIFERATION OF WEAPONS OF MASS DESTRUCTION 283 (2009).

105. *Id*.

106. *See* MICHAEL P. SCHARF, CUSTOMARY INTERNATIONAL LAW IN TIMES OF FUNDAMENTAL CHANGE: RECOGNIZING GROTIAN MOMENTS 178 (2013).

107. GLOBALISATION, MULTILATERALISM, EUROPE: TOWARDS A BETTER GLOBAL GOVERNANCE? 319 (Mario Telò ed., 2013).

108. PROTECTING THE DISPLACED: DEEPENING THE RESPONSIBILITY TO PROTECT 5 (Sara E. Davies & Luke Glanville eds., 2010); THE OXFORD HANDBOOK OF THE RESPONSIBILITY TO PROTECT 145 (Alex J. Bellamy & Tim Dunne eds., 2016).

109. AN INSTITUTIONAL APPROACH TO THE RESPONSIBILITY TO PROTECT 49 (Gentian Zyberi & Kevin T. Mason eds., 2013).

110. ALEX J. BELLAMY, THE RESPONSIBILITY TO PROTECT: A DEFENSE 2 (2015).

111. *See id.* at 7–11.

112. *Id.*

113. *See* Mary Ellen O'Connell, *Peace Through Law and the Security Council: Modelling Law Compliance*, *in* STRENGTHENING THE RULE OF LAW THROUGH THE UN SECURITY COUNCIL 255, 263 (Jeremy Farrall & Hilary Charlesworth eds., 2016).

1. Analysis

The current legal framework says that any unilateral use of force is illegitimate if it is not undertaken with the consent of the host state,[114] in self-defence against an occurred armed attack, or with UNSC authorization.[115] Therefore, any unilateral use of force under R2P without a UNSC mandate is illegitimate[116] and is widely condemned by the international community.[117] The concept of R2P in the context of the unilateral use of force by a state is not unequivocally incorporated in international law, and lacks state practice and *opinio juris*.[118] For these reasons, critics of R2P maintain that any unilateral humanitarian intervention without state consent, UNSC authorization, or compliance with the UN Charter is unlawful under international law.[119] Interestingly, a few scholars have noted that powerful nations have exploited weaker states under the guise of R2P with the unilateral use of force,[120] and human suffering has increased, instead of decreasing.[121] More conclusively, the ICJ has condemned unilateral humanitarian intervention,[122] and has established in the *Yugoslavia* case that unilateral intervention by NATO without UNSC authorization was illegitimate and posed a serious threat to the existing international law of war.[123] Therefore, currently, unilateral

114. Brian L. Job & Anastasia Shesterinina, *China as a Global Norm-Shaper: Institutionalization and Implementation of the Responsibility to Protect, in* IMPLEMENTATION AND WORLD POLITICS: HOW INTERNATIONAL NORMS CHANGE PRACTICE 144, 156 (Alexander Betts & Phil Orchard eds., 2014).

115. *Id.*

116. *See* BETCY JOSE, NORM CONTESTATION: INSIGHTS INTO NON-CONFORMITY WITH ARMED CONFLICT NORMS 83 (2018).

117. See stances of Germany, Belgium and France in 4 OLIVER CORTEN, THE LAW AGAINST WAR: THE PROHIBITION ON THE USE OF FORCE IN CONTEMPORARY INTERNATIONAL LAW 542–43 (Christopher Sutcliffe trans., rprt. 2012).

118. William W. Burke-White, *Adoption of the Responsibility to Protect*, *in* THE RESPONSIBILITY TO PROTECT: THE PROMISE OF STOPPING MASS ATROCITIES IN OUR TIME 34 (Jared Genser & Irwin Cotler eds., 2011).

119. *See* Job & Shesterinina, *supra* note 114, at 156.

120. JOSHUA JAMES KASSNER, RWANDA AND THE MORAL OBLIGATION OF HUMANITARIAN INTERVENTION 147 (2013).

121. Mats Berdal, *United Nations Peacekeeping and the Responsibility to Protect, in* THEORISING THE RESPONSIBILITY TO PROTECT 223, 224 (Ramesh Thakur & William Maley eds., 2015).

122. *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 268 (June 27); *see also* GRAY, *supra* note 102.

123. *See* ANA S. TRBOVICH, A LEGAL GEOGRAPHY OF YUGOSLAVIA'S DISINTEGRATION 355 (2008).

intervention under R2P without a UNSC mandate is considered illegal under international law.[124]

C. Unwilling or Unable Test ("the Test")

Ashley Deeks enhanced this test and expanded its framework in 2012.[125] The test contains several steps to define the legality of the use of force against a state in an armed attack by an NSA.[126] To begin with, it is important to explain a few frequently used terms. For the purposes of this Article, NSAs include non-state actors, non-government organizations, national liberation armies, armed groups, terrorist organizations, rebels, and individuals. A victim state will mean a state against which an armed attack has been carried out by an NSA. And a territorial state will refer to the state where an NSA, that has orchestrated an armed attack against the victim state, is residing.

According to the test, a victim state cannot use force against the territorial state in an armed attack by an NSA if the territorial state is "willing and able" to curb the actions of an NSA.[127] However, the test allows the victim state to use force against the NSA in the sovereign territory of the territorial state in the event of an armed attack by the NSA if the territorial state is either "unwilling or unable" to curb the actions of the NSA.[128] It is pertinent to note here that the applicability of this test requires certain prerequisites. For instance, it is mandatory that there be a victim state, against which an NSA has launched an armed attack.[129] Likewise, there has to be a territorial state, where the NSA is residing and from where it has orchestrated an armed attack against the victim state.[130] In addition, the unwilling or unable test can be divided into four main steps: (1) seeking the consent of the victim state to counter the threat; (2) assessing the threat posed by the NSA; (3) assessing the willingness of the territorial state to counter the threat; and (4) assessing the ability of the territorial state to counter the threat.[131]

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124. *See* Job & Shesterinina, *supra* note 114, at 156; JOSE, *supra* note 116, at 83; CORTEN, *supra* note 117, at 497, 542–43.

125. Ashley S. Deeks, "*Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense*, 52 VA. J. INT'L L. 483, 488 (2012).

126. *See id.* at 486.

127. *Id.* at 487.

128. *Id.* at 487–88.

129. *See id.* at 487.

130. *See id.*

131. *Id.* at 507.

1. Seeking Consent

The first step of the test requires the victim state to seek the consent and collaboration of the territorial state to use force against the NSA.[132] If the territorial state agrees to the use of force against the NSA in collaboration with the victim state, then the next steps of this test are irrelevant[133] because the use of force against an NSA with the consent/collaboration of a territorial state is legal under international law, which is also recognized by the ILC.[134] Therefore, both states can effectively fight against the NSA without violating the sovereignty of the territorial state.[135] However, if the territorial State refuses to consent or collaborate with the victim state, then the other steps of the test apply.[136]

2. Assessing the Threat

The second step assesses the nature of the threat posed by the NSA residing in the territorial state in order to measure the ability of the territorial state to supress the threat and to recognize the extent of the threat.[137] This may include assessment of geographical location, the penetration of the NSA in society, and the sophistication of the attacks and technology of the weapons.[138] A more detailed understanding of the enemy and the threat it poses helps in evaluating the ability of the territorial state to eradicate the threat.[139]

3. Assessing Willingness

If the territorial state refuses to collaborate, step three of the test requires that the victim state assess the willingness of the territorial state to curb

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132. *Id.*
133. QURESHI, *supra* note 2, at 103.
134. *See* Stephen Mathias, *The Use of Force: the General Prohibition and its Exceptions in Modern International Law and Practice*, *in* 8 A NEW INTERNATIONAL LEGAL ORDER: IN COMMEMORATION OF THE TENTH ANNIVERSARY OF THE XIAMEN ACADEMY OF INTERNATIONAL LAW 73, 81 (Chia-Jui Cheng ed., 2016); *see also* MYRA WILLIAMSON, TERRORISM, WAR AND INTERNATIONAL LAW: THE LEGALITY OF THE USE OF FORCE AGAINST AFGHANISTAN IN 2001, at 226 n.425 (2016).
135. QURESHI, *supra* note 19, at 151.
136. QURESHI, *supra* note 2, at 103–04.
137. Deeks, *supra* note 125 at 521.
138. *See id.*
139. QURESHI, *supra* note 2, at 103.

the actions of the NSA.[140] At this step, the victim state requests the territorial state to counter the threat posed by the NSA by taking appropriate measures against the threat.[141] If the territorial state downright refuses to take any appropriate measures to counter the threat posed by the NSA, then the victim state can use force against the NSA in the sovereign territory of the territorial state to counter the threat.[142] However, if the territorial state accepts the request of the victim state to take appropriate measures against the NSA, then the territorial state may assess the ability of the territorial state to curb the threat posed by the NSA.[143]

4. Assessing the Ability

After the acceptance of the request, the victim state must assess the ability of the territorial state to counter the threat posed by the NSA.[144] To assess the ability of the territorial state, the victim state may evaluate the territorial control, military capacity, and plan of action of the territorial state to counter the threat posed by the NSA.[145] If the plan of action of the territorial state is inadequate to counter the threat posed by the NSA then, based on the inability of the territorial state, the victim state can use unilateral force against the NSA residing in the sovereign territory of the territorial state to counter the threat.[146]

5. Analysis of the Test

The test seems reasonable on a superficial reading, and it allows ample opportunity for the territorial state to curb the situation and counter the threat posed by the NSA. The test allows the use of self-defence against an NSA residing in the territorial state.[147] Moreover, the test allows the use of force against an NSA even in situations where the territorial state is trying to curb the activities but is unable to do so.[148] In all three situations, where the territorial state is willing but unable, able but unwilling, or unwilling and unable, the test allows the unilateral use of force against the NSA in a territorial state.[149] It is pertinent to note, however, that the test only allows the use of force against the NSA, and not against the territorial

140. QURESHI, *supra* note 19, at 150–51; Deeks, *supra* note 125, at 521–22.
141. QURESHI, *supra* note 2, at 104–05; Deeks, *supra* note 125, at 521–22.
142. *See* QURESHI, *supra* note 19, at 150–55.
143. *See* QURESHI, *supra* note 2, at 105.
144. Deeks, *supra* note 125, at 525.
145. *See* QURESHI, *supra* note 2, at 105–06.
146. *See* QURESHI, *supra* note 19, at 155–58.
147. *See* Deeks, *supra* note 125, at 487.
148. *Id.* at 487–88.
149. *Id.*

state.[150] For these reasons, the test raises certain key questions of international law. For instance, is self-defence permissible in response to the armed attack by NSA in the sovereign territory of the territorial state under the UN Charter or under the international law of force? Does Article 51 of the UN Charter allow self-defence against the actions of an NSA residing in an innocent state? Similarly, it is also interesting to note that nowhere does the test require the victim state to involve the international community or to seek UNSC authorization to intervene in another state to curb the threat posed by NSA, while allowing unilateral intervention against the sovereignty of a territorial state.[151]

IV. PREREQUISITES OF THE APPLICABLE LAW TO THE TEST

As discussed earlier in Part II of this Article, the current legal framework of using force is enshrined in the UN Charter. Article 51 provides an exception to the prohibition on the use of force: self-defence.[152] Article 51 permits a state to use force in self-defence only if "an armed attack occurs,"[153] which was also discussed in detail in Part III under "R2P." As such, the test only allows use of force by a victim state where the armed attack has already occurred.[154] But, the test allows the use of force against an NSA residing in a territorial state either where the state is harbouring the NSA or where the state is innocent.[155] Therefore, before analysing whether the test constitutes CIL, first it is crucial to explore what an armed attack is. Can an NSA carry out an armed attack? Is it necessary to attribute an armed attack to a state? Does the law allow the use of force against an NSA, especially an NSA residing in an innocent state? The supporters of the use of force in self-defence against an NSA residing in an innocent state argue that the victim state must be allowed to defend itself—no matter who conducts the armed attack.[156] The converse argument is that such a

150. *See generally id*.
151. *See id.* at 506.
152. U.N. Charter art. 51.
153. *Id.*
154. *See* Deeks, *supra* note 125, at 483.
155. *Id.* at 497.
156. *See* Nadia Lerøy Brahimi, Extraterritorial Self-Defense Against Non-State Actors: With Focus on the "Unwilling or Unable" Doctrine (Dec. 12, 2016) (unpublished Master's thesis, University of Bergen) (on file with the University of Bergen Open Research Archive), http://bora.uib.no/bitstream/handle/1956/15467/152861943.pdf?sequence=1 [http://perma.cc/B64Q-DUYT].

use of force violates the sovereignty of a territorial state, which may lead to greater conflicts, and thus the main objective of law, to maintain peace, is lost.[157]

A. Armed Attack

The term 'armed attack' is not defined in international law; thus, the prerequisites of constituting an armed attack are unidentified.[158] However, the *Nicaragua* case requires that a state using collective self-defence is obliged to declare that it is being attacked, and is also obliged to seek the help of other states and the international community.[159] It is also established among the international community regarding the use of force in self-defence that small border skirmishes do not amount to an armed attack.[160] In the *Nicaragua* case the ICJ held that:

> The Court sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces. But the Court does not believe that the concept of "armed attack" includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support. Such assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States.[161]

Likewise, support for an NSA in the territory of another state may constitute an armed attack,[162] which is defined by the UN General Assembly as "organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another state or getting involved in activities within its territory directed toward the commission of such actions that involve a threat or use of force."[163]

1. Threshold of the Armed Attack

According to the ICJ, the armed attack occurs only with the gravest form of the use of force, which is to be separated from less serious forms of the

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157. *See* U.N. Charter art. 1; Brahimi, *supra* note 156.
158. *See* AMOS N. GUIORA, MODERN GEOPOLITICS AND SECURITY: STRATEGIES FOR UNWINNABLE CONFLICTS 44 (2010).
159. *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶¶ 197–199 (June 27).
160. *See* THE HANDBOOK OF THE INTERNATIONAL LAW OF MILITARY OPERATIONS 187-91 (Terry D. Gill & Dieter Fleck eds., 2015).
161. Nicar. v. U.S 1986 I.C.J. at ¶ 195.
162. *Id.*
163. G.A. Res. 2625 (XXV), at pmbl. (Oct. 20, 1970).

use of force.[164] The ICJ stated that "it will be necessary to distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave form."[165] The court added that small frontier skirmishes do not constitute armed attack.[166] The court distinguished between the prohibition on the use of force and armed attack, such that armed attack requires a higher threshold of the use of force for self-defence.[167] The ICJ restated this requisite for a higher threshold in the *Democratic Republic of Congo v. Uganda*[168] and the *Oil Platform* case.[169] For instance, in *Democratic Republic of Congo v. Uganda* the ICJ stated that only "large-scale attacks" constitute armed attack.[170] However, recently the doctrine of "commutation of events" has been recognized by a few scholars.[171] This doctrine entails that a small attack may not constitute an armed attack, but a series of small-scale events of the use of force may constitute an armed attack if they are weighed cumulatively.[172] This doctrine is not part of international law as such, but academics have impliedly attributed this doctrine to the wordings of ICJ judgements in the *Oil Platform* case, *Democratic Republic of Congo v. Uganda*, and the *Nicaragua* case.[173] For example, the ICJ stated in the *Oil Platform* case that "even taken cumulatively . . . these incidents do not seem to the Court to constitute an armed attack on

164. Francette van Tonder, Self-Defence Against Non-State Actors: The Terrorism by Al-Shabaab in Kenya (Oct. 2015) (unpublished Master of Law thesis, Univ.of Pretoria) (on file with Univ. of Pretoria), https://repository.up.ac.za/bitstream/handle/2263/53201/VanTonder_Self_2016.pdf?sequence=1 [http://perma.cc/GU79-QUCV].

165. Nicar. v. U.S 1986 I.C.J. at ¶ 191.

166. *Id.* ¶ 195.

167. *See* Mary Ellen O'Connell, *Historical Development and Legal Basis, in* THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 1, 1–8 (Dieter Fleck ed., 3d ed. 2013); *See* Abdulqawi A. Yusuf, *The Notion of "Armed Attack" in the Nicaragua Judgment and its Influence on Subsequent Case Law*, 24(2) LEIDEN. J. INT'L L. 461, 463 (2012); *see also* George Nolte & Albrecht Randelzhofer, *Ch. VII Action with Respect to Threats to the Peace, Breaches of Peace, and Acts of Aggression, Article 51*, *in* 2 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY (Brunno Simma et al. eds., 3d ed. 2012).

168. *See* Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. Rep. 168, ¶ 147 (Dec. 27).

169. *See* Case Concerning Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. Rep. 161, ¶ 51 (Nov. 6).

170. *See* Dem. Rep. Congo v. Uganda 2005 I.C.J. at ¶¶ 144–147.

171. *See* TOM RUYS, 'ARMED ATTACK' REQUIREMENT AND ARTICLE 51 OF THE UN CHARTER: EVOLUTIONS IN CUSTOMARY LAW AND PRACTICE 168–69 (2010).

172. *See* Nolte & Randelzhofer, *supra* note 167, at 73; *see also* Barry Levenfeld, *Israel's Counter-Fedayeen Tactics in Lebanon: Self-Defense and Reprisal Under Modern International Law*, 21 COLUM. J. TRANSNAT'L L. 1, 16 (1982).

173. van Tonder, *supra* note 164.

the United States."[174] Similarly, in the *Nicaragua* case, the court considered armed attacks "singly or collectively."[175]

2. Attribution to the State

In several cases, the ICJ has established law on armed attacks by NSAs and the responsive self-defence against NSAs residing in territorial states. According to the ICJ,[176] the UN General Assembly,[177] and the UN Security Council,[178] NSAs can carry out armed attacks.[179] However, only attacks by NSAs of the gravest nature will constitute an armed attack in accordance with the true meaning of Article 51 of the UN Charter.[180] However, the ICJ also established in the *Nicaragua* case that the use of force by NSAs can only constitute an "armed attack" in situations where they were acting "by or on behalf of a State."[181] Therefore, based on the reasoning that the territorial state was not responsible for the relevant armed attack conducted by the NSA residing in the territorial state, the ICJ rejected the right of self-defence of the victim state against the NSA.[182] Similarly, regarding the attribution of an armed attack to a state, in the *Advisory Opinion of the Construction of the Wall* case, the ICJ maintained that "Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State."[183] Likewise, in the *Democratic Republic of Congo v. Uganda* case, the ICJ reiterated that Uganda had no right to self-defence against Congo, because the armed attack was not attributable against Congo but rather to Allied Democratic Forces (ADF), an NSA group.[184] The General Assembly also limits armed attacks to state actions, starting that an armed attack may be pursued also by "sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State

174. Case Concerning Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. Rep. 161, ¶ 64 (Nov. 6).

175. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 231 (June 27).

176. *Id.* ¶ 195.

177. G.A. Res. 3314 (XXIX), annex, art. 3(g) (Dec. 14, 1974).

178. *See* S.C. Res. 1368 (Sept. 12, 2001); S.C. Res. 1373 (Sept. 28, 2001).

179. Nicar. v. U.S. 1986 I.C.J. at ¶ 195 (citing G.A. Res. 3314 (XXIX), annex, art. 3(g)).

180. LUBELL, *supra* note 101; *see also* Christian J. Tams, *The Use of Force Against Terrorists*, 20(2) E.J.I.L. 359, 369–70 (2009).

181. Nicar. v. U.S. 1986 I.C.J. at ¶ 195.

182. *Id.*

183. Legal Consequences of the Construction of a Wall in the Occupied Palestinians Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, ¶ 139.

184. Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J Rep. 168, ¶¶ 146–147.

of such gravity as to amount to the acts listed above, or its substantial involvement therein."[185] As a result, it can be established that the law allows the unilateral use of force in self-defence against an NSA only in situations where the armed attack by the NSA is attributable to a state. In other words, the ICJ established that there is no self-defence against armed attack in situations where the state is innocent. However, in this context a very appropriate question arises: what about the justice for the victim state? Is the victim state unable to seek justice in respect of threats and armed attacks against its sovereignty by an NSA residing in an innocent state? The answers to these questions are available in the following discussion regarding force used with UNSC authorization.

B. Security Council Authorization

UNSC authorization is another way of using legal force. Therefore, Howard Friel and Noam Chomsky argue that all uses of force without the legal basis of self-defence or UNSC authorization are impermissible under the current legal framework of the law of war.[186] Articles 41 and 42 of the UN Charter empower the UNSC to determine international threats to peace and security, and to take appropriate action to restore peace.[187] For these purposes, armed forces of member states[188] and regional bodies[189] can be utilized by the UNSC.[190] The UN Charter requires that, to be effective, UNSC authorization must not get any negative votes, known as the "veto," from the permanent five members.[191] However, Oliver Corten argues that the UNSC cannot intervene in internal state affairs,[192] to police moral values, support social values, engineer economy, or enforce international law, without exhausting peaceful means.[193] Nevertheless, the UN Charter offers a wide margin of discretion that empowers the UNSC to determine for itself that what constitutes a threat to international peace and what does not, and to

185. G.A. Res. 3314, *supra* note 177.
186. *See generally* HOWARD FRIEL, CHOMSKY AND DERSHOWITZ: ON THE ENDLESS WAR AND CIVIL LIBERTIES (2013).
187. U.N. Charter arts. 41–42.
188. *See id*. art. 48.
189. *See id*. art. 53.
190. *See id*. arts. 43–46.
191. *See id*. art. 27.
192. *See id*. art. 2.
193. CORTEN, *supra* note 117, at 322.

take appropriate action.[194] The UNSC has authorized numerous uses of force against several countries, including Afghanistan,[195] Iraq,[196] Haiti,[197] Bosnia-Herzegovina[198] and Rwanda.[199] These interventions were authorized for the reasons of humanitarian aid, the restoration of democracy, military purposes and the restoration of peace.[200] Therefore, any state facing future threats or that is attacked by an NSA residing in an innocent territorial state can use force in its defence with UNSC authorization.

V. IS THE TEST PART OF CUSTOMARY INTERNATIONAL LAW (CIL)?

While scholars suggest different origins for the "unwilling or unable" test, Ashley Deeks suggests that the test has its origin in the law of neutrality.[201] Deeks argues that force can be used in a neutral state to stop a violation.[202] But, according to the Hague Convention, the sovereignty of a neutral state is inviolable and responsive force against any attempt to violate that sovereignty cannot be considered hostile.[203] Because the laws of neutrality predate the UN Charter, and apply only to belligerent states, Gareth Williams rejects Deeks's theory of the origin of the test.[204] Instead, he argues that the test has its origin in the law of necessity in CIL—that it becomes necessary for the victim state to use force if the territorial state is unwilling or unable to curb the threats.[205] However, Anton Larsson argues that the test is only an extension of the current legal framework, widely interpreting the laws of self-defence and contending that the test is arguably a part of CIL and not a new exception to the prohibition on the use of force.[206] Therefore, legally, the test also must be used as a last resort after exhausting all possible peaceful means, including seeking consent and referring the matter to the

194. U.N. Charter arts. 39, 42.
195. S.C. Res. 1386 (Dec. 20, 2001).
196. S.C. Res. 1511 (Oct. 16, 2003).
197. S.C. Res. 940 (July 31, 1994).
198. S.C. Res. 1031 (Dec. 15, 1995).
199. S.C. Res. 929 (June 22, 1994).
200. CORTEN, *supra* note 117, at 312–14.
201. Deeks, *supra* note 125, at 497.
202. *Id*. at 499.
203. *See* Convention Respecting the Rights and Duties of Neutral Powers and Persons in Cases of War on Land, arts. 1, 2, 10, Oct. 18, 1907, 36 Stat. 2310, 540 U.N.T.S. 654.
204. Gareth D. Williams, *Piercing the Shield of Sovereignty: An Assessment of the Legal Status of the Unwilling or Unable Test*, 36(2) U. N.S.W. L.J. 619, 631 (2013).
205. *Id.* at 639–40.
206. Anton Larsson, The Right of States to Use Force Against Non-State Actors—Is the Unwilling or Unable Test Customary International Law? 43 (2015) (unpublished LL.D thesis, Stockholm University), http://www.diva-portal.org/smash/get/diva2:854914/FULLTEXT01.pdf [https://perma.cc/24JH-JHRS].

UNSC.[207] Deeks herself concluded that the unwilling or unable test "currently lacks sufficient content to serve as a restrictive international norm."[208] Therefore, it is only reasonable to explore whether the test can be considered a part of CIL.

CIL is described as "international custom, as evidence of a general state practice accepted as law,"[209] comprised of "state practice" and "*opinio juris*." State practice must be general and consistent, followed by overwhelming majority of states, without any contradiction or discrepancies in the practice.[210] *Opinio juris* requires that the practice be generally accepted as law with the sense of legal obligation.[211] Applicability of the test has developed over the past decade.[212] However, for the sake of objectivity, this Article will include instances of states using force against NSAs in innocent territorial states before the test had even arrived. Therefore, this section will try to explore state practice and *opinio juris* of the test.

A. U.S. v. Cambodia, 1970

In 1970, the U.S. used force in the territory of innocent Cambodia, by relying on self-defence against the actions of an NSA, based on the allegation that Cambodia lacked territorial controls and was unable or unwilling to prevent future threats.[213] This reasoning is strikingly similar to the test, except that the U.S. did not seek the consent of the innocent state.[214] The international community, including the USSR and the Djakarta Conference

207. *Id*. at 14.
208. Deeks, *supra* note 125, at 546.
209. Statute of the International Court of Justice art. 38, ¶ 1.
210. Michael Wood (Special Rapporteur on Identification of Customary International Law), *Second Rep. on Identification of Customary International Law*, ¶¶ 52, 55, 59, U.N. Doc. A/CN.4/672 (May 22, 2014); Josef L. Kunz, *The Nature of Customary International Law*, 47 AM. J. INT'L L. 662, 666 (1953).
211. Wood, *supra* note 210, ¶ 69; Larsson, *supra* note 206, at 9.
212. *E.g.*, Deeks, *supra* note 125; *see also* Kevin Jon Heller, *The Earliest Invocation of "Unwilling or Unable,"* OPINIO JURIS (Mar. 19, 2019), http://opiniojuris.org/2019/03/19/the-earliest-invocation-of-unwilling-or-unable/ [https://perma.cc/W69S-CV3U] (explaining that the "unwilling or unable" doctrine was, to an extent, invented in 1970).
213. Statement from John R. Stevenson, Legal Advisor, U.S. Dep't of State, to the NYC Bar Association, U.S. Statement on Issues of International Law in Cambodian Incursion (May 28, 1970), *reprinted in The Cambodian Incursion: United States Notifies U.N. Security Council*, 9 I.L.M. 838, 840 (1970).
214. Larsson, *supra* note 206, at 18.

of eleven Asian countries, highly condemned the U.S. actions as an invasion of and aggression against Cambodia.[215]

B. Turkey v. Iraq, 1995

In 1995, Turkey used force in the territory of Iraq against an NSA by arguing that Iraq lacked authority in some parts of its territory, which had been used by the NSA to attack Turkey.[216] The U.S. backed Turkey by stating that Turkey was right to use force against Iraq because Iraq was "unable or unwilling" to curb future attacks by the NSA residing in Iraqi territory.[217] Later, Turkey also stated that it must protect itself against the "unable and unwilling" Iraq.[218] However, it is pertinent to note that Turkey did not seek Iraq's consent, nor did it make explicit reference to its right to self-defence, and Iraq's inability was mainly attributed to a no-fly zone created by the U.S., United Kingdom (UK), and France.[219] With the exception of four states, the international community, including the League of Arab States, the Gulf Cooperation Council, and the Non-Aligned Movement, highly condemned the Turkish invasion and added that these actions violated the territorial integrity of Iraq.[220]

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215. *Id.*; Permanent Rep. of the USSR to the U.N., Letter dated May 8, 1970 from the Permanent Rep. of the Union of Soviet Socialist Republics to the United Nations addressed to the President of the Security Council, U.N. Doc. S/9804 (May 15, 1970); Permanent Rep. of Indonesia to the U.N., Letter dated June 19, 1970 from the Permanent Rep. of Indonesia to the United Nations addressed to the President of the Security Council, U.N. Doc. S/9843 (June 19, 1970).

216. Larsson, *supra* note 206, at 19.

217. U.S. Dep't of State, Daily Press Briefing (July 7, 1995) (statement of Nicholas Burns, Briefer), http://www.hri.org/news/usa/std/1997/97-07-10.std.html [https://perma.cc/F823-RKZB].

218. Chargé d'affaires a.i. of the Permanent Mission of Turkey to the U.N., Identical Letters dated June 27, 1996 from the Chargé d'affaires a.i. of the Permanent Mission of Turkey to the United Nations addressed to the Secretary-General and to the President of the Security Council, U.N. Doc. S/1996/479 (July 2, 1996).

219. Larsson, *supra* note 206, at 19–22.

220. *Id.* at 21; Permanent Observer for the League of Arab States to the U.N., Letter dated Sept. 24, 1996 from the Permanent Observer for the League of Arab States to the United Nations addressed to the Secretary-General, U.N. Doc. S/1996/796 (Sept. 26, 1996); Permanent Rep. of Qatar to the U.N., Letter dated June 2, 1997 from the Permanent Rep. of Qatar to the United Nations addressed to the Secretary-General, U.N. Doc. A/52/168-S/1997/429 (June 3, 1997).

C. Congo v. Uganda, 1995

In 1995, the Democratic Republic of Congo (DRC) used force against the ADF (an NSA) in Uganda without consent[221] in response to armed attacks in the DRC by the ADF by relying on self-defence against the NSA based on the 'inability' of Uganda to control its territory.[222] The ICJ in this case, denied the DRC's right to self-defence, and instead referred to the DRC's military activities as a military occupation.[223] In this case, the DRC argued that the actions of the NSA were attributable to Uganda. Interestingly, the fact that the DRC relied on perceived allegations to attribute the armed attacks shows the conviction of the DRC that self-defence was only applicable to armed attacks attributable to a state.[224] Collectively, the international community, including the ICJ, the EU, the Organization for African Unity, and the Security Council, condemned the DRC's actions.[225]

D. Russia v. Georgia, 2002

In 2002, Russia allegedly used force against Chechen rebels (NSA) in Georgia.[226] Russia argued that Georgia was unable and unwilling to curb

221. Uganda initially consented but retracted such consent, which can be understood as unwillingness. Armed Activities on Territory of Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. Rep. 168, 196–99 (Dec. 19).

222. *Id.* at 215, 219, 223; INT'L CRISIS GRP., NORTH KIVU, INTO THE QUAGMIRE? AN OVERVIEW OF THE CURRENT CRISIS IN NORTH KIVU 7 (1998), https://www.africaportal.org/documents/223/North_Kivu_Into_the_Quagmire_An_Overview_of_the_Current_Crisis_in_North_Kivu.pdf [https://perma.cc/F823-RKZB].

223. Dem. Rep. Congo v. Uganda, 2005 I.C.J. at 214, 222-23, 231.

224. Larsson, *supra* note 206, at 26.

225. Dem. Rep. Congo v. Uganda, 2005 I.C.J. at 222–23; Permanent Rep. of Austria to the U.N., Letter dated Aug. 12, 1998 from the Permanent Rep. of Austria to the United Nations addressed to the Secretary-General, U.N. Doc. S/1998/753 (Aug. 13, 1998); Permanent Rep. of Namibia to the U.N., Letter dated Aug. 17, 1998 from the Permanent Rep. of Namibia to the United Nations addressed to the Secretary-General, U.N. Doc. S/1998/774 (Aug. 18, 1998); S.C. Res. 1234 (Apr. 9, 1999).

226. JACOB BERCOVITCH & JUDITH FRETTER, REGIONAL GUIDE TO INTERNATIONAL CONFLICT AND MANAGEMENT FROM 1945 TO 2003, at 256 (2004); Permanent Rep. of Georgia to the U.N., Letter dated Aug. 23, 2002 from the Permanent Rep. of Georgia to the United Nations addressed to the Secretary-General, U.N. Doc. A/57/341-S/2002/950 (Aug. 23, 2002); *Russia Denies Bombing Pankisi, While Georgia Claims Two Killed*, RADIO FREE EUR./RADIO LIBERTY (Aug. 23, 2002), https://www.rferl.org/a/1142744.html [https://perma.cc/Z2BN-NKML].

the threats due to its porous borders,[227] and that Georgia ignored UNSC Resolution 1373.[228] Georgia stated that Russian activities were acts of aggression.[229] They were not aligned with any norm of the international law, and they were a representation of a broad interpretation of self-defence under Article 51.[230] This is a good example of *opinio juris* on the test. But the fact that Russia did not take any responsibility for its alleged actions in this case and condemned the test in 2014, casts some doubts about Russian conviction in respect to the test.[231]

E. U.S. v. Syria, 2014

The most equivocal and recent example of the test in CIL was in 2014. On Iraq's request,[232] the U.S. used force against the Islamic State of Iraq and the Levant (ISIL, an NSA) in the territory of Syria under collective self-defence of Iraq.[233] A year after using force against Syria, the U.S. explicitly stated that Syria was "unwilling or unable to prevent the use of its territory for [armed] attacks."[234] However, it is pertinent to note that Syria was and still is very willing to fight against ISIL, but the U.S. never sought cooperation or consent of Syria.[235] In fact, Syria is using force

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227. *Russian Officials Again Call for Joint Action Against 'Terrorists' in Georgia*, RADIO FREE EUR./RADIO LIBERTY (Feb. 20, 2002), https://www.rferl.org/a/1142619.html [https://perma.cc/H56B-5LAT]; Chargé d'affaires a.i. of the Permanent Mission of the Russian Federation to the U.N., Letter dated July 31, 2002 from the Chargé d'affaires a.i. of the Permanent Mission of the Russian Federation to the United Nations addressed to the Secretary-General, U.N. Doc. A/57/269-S/2002/854 (July 31, 2002); BERTIL NYGREN, THE REBUILDING OF GREATER RUSSIA: PUTIN'S FOREIGN POLICY TOWARDS THE CIS COUNTRIES 120 (2008).

228. Permanent Rep. of the Russian Federation to the U.N., Letter dated Sept. 11, 2002 from the Permanent Rep. of the Russian Federation to the United Nations addressed to the Secretary-General, U.N. Doc. S/2002/1012 (Sept. 12, 2002).

229. Permanent Rep. of Georgia to the U.N., Letter dated Sept. 13, 2002 from the Permanent Rep. of Georgia to the United Nations addressed to the Secretary-General, U.N. Doc. A/57/409-S/2002/1035 (Sept. 16, 2002).

230. *Id.*

231. *See* Larsson, *supra* note 206, at 27–32; Elena Chachko & Ashley Deeks, *Who Is on Board with "Unwilling or Unable"?*, LAWFARE BLOG (Oct. 10, 2016, 1:55 PM), https://www.lawfareblog.com/who-board-unwilling-or-unable [https://perma.cc/2YFQ-J5KU].

232. Permanent Rep. of Iraq to the U.N., Letter dated Sept. 20, 2014 from the Permanent Rep. of Iraq to the United Nations addressed to the President of the Secretary Council, U.N. Doc. S/2014/691(Sept. 22, 2014).

233. Permanent Rep. of the U.S. to the U.N., Letter dated Sept. 23, 2014 from the Permanent Rep. of the U.S. to the United Nations addressed to the Secretary-General, U.N. Doc. S/2014/695 (Sept. 23, 2014).

234. *Id.*

235. Larsson, *supra* note 206, at 38.

against ISIL.[236] However, Syria is unable to eradicate the future threats posed by the NSA residing in its territory because the U.S., UK, and other states have been illegally aiding and abetting non-state groups of Syrian rebels and other armed groups in Syria.[237]

According to the test, the U.S. could only use force against the state in Syria. But the U.S. and coalition members not only used force against the Syrian state directly,[238] but also armed Syrian rebels[239] for the purposes of changing the regime, which increased the instability and inability of Syria and goes against the framework of the test. Nevertheless, the signatories of the Jeddah Communique, the UK, and the Secretary-General of the UN have supported the United States' use of force in Syria,[240] whereas, Ecuador, Russia, China, Chad, Algeria, Brazil, Belarus, South Africa, India, Venezuela, Ecuador, Cuba, Argentina, and Iran have condemned the U.S. and consider its aggression a violation of the sovereignty of Syria, intervention in internal affairs, a failure to seek the cooperation of Syria, and an act not in conformity with the norms of international law.[241] Interestingly, the coalition members

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236. *Syria Army Pushes ISIL Out of South Damascus District: State TV*, AL JAZEERA (May 21, 2018), https://www.aljazeera.com/news/2018/05/syria-army-pushes-isil-south-damascus-district-state-tv-180521114538926.html [https://perma.cc/NMH4-ZVD8].

237. JOHN W. PARKER, PUTIN'S SYRIAN GAMBIT: SHARPER ELBOWS, BIGGER FOOTPRINT, STICKIER WICKET 49 (2017).

238. Letter from Donald J. Trump, President, to the Speaker of the House of Representatives & the President Pro Tempore of the Senate (Apr. 8, 2017), https://www.whitehouse.gov/briefings-statements/letter-president-speaker-house-representatives-president-pro-tempore-senate/ [https://perma.cc/Q29P-HQ7L *see* MARTIN S. INDYK, KENNETH G. LIEBERTHAL & MICHAEL E. O'HANLON, BENDING HISTORY: BARACK OBAMA'S FOREIGN POLICY 179 (2012).

239. PARKER, *supra* note 237.

240. Larsson, *supra* note 206, at 35–38.

241. *See* Press Conference, Press Briefing by Foreign Minister of Ecuador, H.E. Mr. Ricardo Patiño Aroca (Sept. 24, 2014), http://webtv.un.org/meetings-events/general-assembly/watch/ricardo-patiño-aroca-ecuador-press-conference/3806104847001/?page=3&sort=date&term= [https://perma.cc/T3G2-Z79C]; Press Conference, Briefing by Official Representative of the Russian Ministry of Foreign Affairs Alexander Lukashevich (Oct. 23, 2014) http://www.mid.ru/en/press_service/spokesman/briefings/-/asset_publisher/D2wHaWMCU6Od/content/id/951814 [https://perma.cc/42MY-QXFS]; Press Conference, Foreign Ministry Spokesperson Hua Chunying's Remarks (Apr. 14, 2018), https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1551073.shtml [https://perma.cc/NHU4-8N8K]; Olivier Corten, *The 'Unwilling or Unable' Test: Has It Been, and Could It be, Accepted?*, 29 LEIDEN J. INT'L L. 777, 789–91 (2016); *The Shame of the United Nations*, SYRIAN CIVIC PLATFORM (Apr. 9, 2018), https://www.scplatform.net/en/the-shame-of-the-united-nations/ [https://perma.cc/2YYE-KYBJ]; Alex Leff, *Brazil and Ecuador Come Out Against Airstrikes in Syria,* PRI (Sept. 24, 2014, 9:45 PM), https://www.pri.org/stories/2014-09-24/brazil-and-ecuador-come-out-against-airstrikes-syria [https://perma.cc/4C2T-PHCR]; Heather

did not refer to the test in their initial letters to the UNSC.[242] Even UNSC Resolution 2249 did not refer to the test or to Chapter VII of the UN Charter in calling upon member states to take action to curb ISIL activities.[243] Since the UNSC is empowered to identify threats to the peace and security of this world and take any measures to curb potential threats, UNSC Resolution 2249 can only be seen as UNSC authorization, well established under current legal framework.[244] Thus, UNSC Resolution 2249 and the test cannot be considered a change in the law of war.

CONCLUSION

The main reason for developing the laws of war was to limit the use of force and safeguard the peace and security of the world.[245] Under the current legal framework, the use of force is completely prohibited except in two

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Saul, *Syria Air Strikes: Iran 'Says US Attacks on Isis Are Illegal'*, INDEPENDENT (Sept. 23, 2014, 4:20 PM), https://www.independent.co.uk/news/world/middle-east/syria-air-strikes-iran-says-us-attacks-on-isis-are-illegal-9751245.html [https://perma.cc/Y37P-5697].

242. *See, e.g.*, Permanent Rep. of Turkey to the U.N., Letter dated June 14, 2015 from the Permanent Representative of Turkey to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2015/434 (June 15, 2015) (calling on the U.N. to take all necessary measures to maintain the regional peace and security without mentioning the unwilling or unable test); Chargé d'affaires a.i. of the Permanent Mission of Germany to the U.N., Letter dated Dec. 10, 2015 from the Chargé d'affaires of the Permanent Mission of Germany to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2015/946 (Dec. 10, 2015) (stating the exercise of the right of collective self-defence without mentioning the unwilling or unable test); *but see, e.g.*, Permanent Rep. of the U.S. to the U.N., Letter dated Sept. 23, 2014 from the Permanent Representative of the United States. to the United Nations. addressed to the Secretary-General, U.N. Doc. S/2014/695 (Sept. 23, 2014) (stating that the U.S. initiated necessary and proportionate military actions in Syria based on the inherent right to self-defence established by the unwilling or unable test); Permanent Rep. of Austl. to the U.N., Letter dated Sept. 9, 2015 from Permanent Representative of Australia to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2015/693 (Sept. 9, 2015) (stating that Austl. was undertaking necessary and proportionate military operations in Syria based on the unwilling or unable test); Chargé d'affaires a.i. of the Permanent Mission of Canada to the U.N., Letter dated Mar. 31, 2015 from Chargé d'affaires a.i. of the Permanent Mission of Canada to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2015/221 (Mar. 31, 2015) (stating that Canada would act in self-defence in Syria based on the unwilling or unable test); Chargé d'affaires a.i. of the Permanent Mission of Turkey to the U.N., Letter dated July 24, 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Turkey to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2015/563 (July 24, 2015) (stating that Turkey would exercise the inherent right to self-defence based on the unwilling or unable test).

243. *See* S.C. Res. 2249 (Nov. 20, 2015); SHERIF ELGEBEILY, THE RULE OF LAW IN THE UNITED NATIONS SECURITY COUNCIL DECISION-MAKING PROCESS: TURNING THE FOCUS INWARDS 69 (2017).

244. U.N. Charter arts. 39–42.

245. *See* U.N. Charter pmbl.

situations: (1) in accordance with the right to self-defence or (2) with UNSC authorization.[246] Therefore, there is no exception to use force against the sovereignty of another state. That is why all the unilateral uses of force in the absence of self-defence or UNSC authorization are considered impermissible in accordance with the present legal system of the use of force.[247] Yet, in the post-Charter era, including the twenty-first century, there have been some deviations from the current legal framework.

For instance, under the guise of "anticipatory self-defence," in spite of clear references in Article 51 of the UN Charter to the occurrence of an armed attack,[248] states have argued that they could use force before an armed attack had occurred within the meaning of Article 51 by including CIL if the attack was imminent.[249] A few states even used force against other states by using this theory without the occurrence of an armed attack.[250] However, the ICJ, the drafters of the UN Charter, the international community, and the overwhelming majority of prominent scholars concluded that this notion is inacceptable in the international law of war because it allows too much room for abuse and violates the UN Charter.[251]

Similarly, under the notion of R2P, numerous countries have also used unilateral force against other states as humanitarian intervention through military alliances such as NATO, without UNSC authorization[252] or without the occurrence of an armed attack. The concept of R2P is also not unequivocally incorporated in international law, and lacks state practice and *opinio juris*.[253] For these reasons, critics of R2P maintain that any unilateral humanitarian intervention without state consent, without UNSC authorization, or compliance with the UN Charter is unlawful under international law.[254] More conclusively,

246. U.N. Charter arts. 2, ¶¶ 4, 39–42, 51.
247. *See* sources cited *supra* note 61.
248. U.N. Charter art. 51.
249. *See* BOWETT, *supra* note 96; O'Brien, *supra* note 97; AREND & BECK, *supra* note 36, at 73; Lietzau, *supra* note 62; Murphy, *supra* note 63, at 197, 207.
250. *See* U.N. SCOR, 36th Sess., 2280th mtg. at 8–12, U.N. Doc. S/PV.2280 (June 12, 1981); U.N. SCOR, 22d Sess., 1348th mtg. at 14–18, U.N. Doc. S/PV.1348 (June 6, 1967); Shipler, *supra* note 78.
251. *See* BROWNLIE, *supra* note 91; DINSTEIN, *supra* note 54, at 168, 173; HENKIN, *supra* note 93; JESSUP, *supra* note 94; Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 176 (June 27); LUBELL, *supra* note 101; GRAY, *supra* note 102; FOCARELLI, *supra* note 88.
252. *See* O'Connell, *supra* note 113.
253. Burke-White, *supra* note 118.
254. *Id.*; Job & Shesterinina, *supra* note 114.

the ICJ has condemned unilateral humanitarian interventions,[255] and established in the *Yugoslavia* case that unilateral intervention by NATO without UNSC authorization was illegitimate and posed a serious threat to the existing international law of the use of force.[256] Therefore, unilateral intervention under R2P without a UNSC mandate is currently considered illegal under international law.[257]

Several states and scholars argue that the test can be employed to use force against NSAs residing in innocent states as an extension to the right to self-defence.[258] Similar to the current legal framework,[259] the test requires that the victim state be a victim to an armed attack. It also requires that such armed attack be a large-scale[260] and not a mere border skirmish.[261] Similarly, both the current legal framework and the test also concur on the element that, like states, NSAs can also carry out armed attacks against another state, which can lead to the responsive use of force in self-defence.[262] However, the current legal framework and the test diverge in determining the right to self-defence against NSAs residing in innocent states. The law is well established by several ICJ cases that there cannot be a right to self-defence against a NSA in situations where the armed attack is not attributable to the territorial state.[263] By contrast, the test establishes that if the territorial state is unable or willing to curtail non-attributable armed attacks, the victim state can use force in self-defence.[264] This contradicts the aforementioned law of international law, which forbids the use of force in self-defence against an innocent state in response to armed attack by a NSA.[265]

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255. GRAY, *supra* note 102, at 41; *see also* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 268 (June 27).

256. TRBOVICH, *supra* note 123.

257. *See* Job & Shesterinina, *supra* note 114; JOSE, *supra* note 116; Burke-White, *supra* note 118; CORTEN, *supra* note 117, at 497, 543

258. Deeks, *supra* note 125, at 487–88.

259. U.N. Charter art. 51.

260. *See* Armed Activities on Territory of Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. Rep. 168, ¶¶ 144–147 (Dec. 19).

261. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶¶ 191–195 (June 27).

262. *See id.* ¶ 195; G.A. Res. 3314, *supra* note 177, at 143; S.C. Res. 1368, *supra* note 178; S.C. Res. 1373, *supra* note 178.

263. Nicar. v. U.S., 1986 I.C.J. at 24; *see also* Legal Consequences of Construction of Wall in Occupied Palestinians Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, ¶ 139 (July 9); Dem. Rep. Congo v. Uganda, 2005 I.C.J. ¶¶ 146–147; G.A. Res. 3314, *supra* note 177, at 143.

264. Deeks, *supra* note 125, at 487–88.

265. Nicar. v. U.S., 1986 I.C.J. at 24; *see also* Legal Consequences of Construction of Wall in Occupied Palestinians Territory, 2004 I.C.J. ¶ 139; Dem. Rep. Congo v. Uganda, 2005 I.C.J. ¶¶ 146–147; G.A. Res. 3314, *supra* note 177, at 143.

In conclusion, because of the test's lowered threshold of the use of force and its deviation from the current legal framework, the international community has not yet accepted the test.[266] While it may garner acceptance in the future, states have been reluctant to rely on the test.[267] Because the test is seen as a broad interpretation of self-defence under Article 51,[268] the international community believes the current legal framework of international law of using force under the Charter is sufficient to maintain peace and security in the world.[269] Thus, there is no room to reinterpret the laws of using force.[270] Moreover, the test has only been explicitly referred to once in *opinio juris* in reference to the conflict between the U.S. and Syria. However, there is not a sense of legal conviction among the U.S.-led coalition members, as evidenced by the fact that no state referred to the test in its initial letter to the UNSC[271] after a year of using

266. Corten, *supra* note 241, at 777.
267. *Id.*
268. *Id.*
269. *Id.* at 799.
270. Olivier Corten, *A Plea Against the Abusive Invocation of Self-Defence as a Response to Terrorism*, EJIL: TALK! (July 14, 2016), https://www.ejiltalk.org/a-plea-against-the-abusive-invocation-of-self-defence-as-a-response-to-terrorism/ [https://perma.cc/9TP6-GAF7].
271. *See, e.g.*, Permanent Rep. of Turkey to the U.N., Letter dated June 14, 2015 from the Permanent Representative of Turkey to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2015/434 (June 15, 2015) (calling on the U.N. to take all necessary measures to maintain the regional peace and security without mentioning the unwilling or unable test); Chargé d'affaires a.i. of the Permanent Mission of Germany to the U.N., Letter dated Dec. 10, 2015 from the Chargé d'affaires of the Permanent Mission of Germany to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2015/946 (Dec. 10, 2015) (stating the exercise of the right of collective self-defence without mentioning the unwilling or unable test); *but see, e.g.*, Permanent Rep. of the U.S. to the U.N., Letter dated Sept. 23, 2014 from the Permanent Representative of the United States. to the United Nations. addressed to the Secretary-General, U.N. Doc. S/2014/695 (Sept. 23, 2014) (stating that the U.S. initiated necessary and proportionate military actions in Syria based on the inherent right to self-defence established by the unwilling or unable test); Permanent Rep. of Austl. to the U.N., Letter dated Sept. 9, 2015 from Permanent Representative of Australia to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2015/693 (Sept. 9, 2015) (stating that Austl. was undertaking necessary and proportionate military operations in Syria based on the unwilling or unable test); Chargé d'affaires a.i. of the Permanent Mission of Canada to the U.N., Letter dated Mar. 31, 2015 from Chargé d'affaires a.i. of the Permanent Mission of Canada to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2015/221 (Mar. 31, 2015) (stating that Canada would act in self-defence in Syria based on the unwilling or unable test); Chargé d'affaires a.i. of the Permanent Mission of Turkey to the U.N., Letter dated July, 24 2015 from the Chargé

force against Syria.[272] Later, only four states made reference to the test after changing their legal reasoning.[273] Based on the unwillingness of the majority of UN members to accept the test,[274] inability to conclude legal conviction,[275] and inconsistency in state practice and *opinio juris* of this test,[276] it is evident that the test is not seen as a legal obligation and contains several discrepancies in its practice. Therefore, it cannot yet be considered a rule of customary international law.[277]

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d'affaires a.i. of the Permanent Mission of Turkey to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2015/563 (July 24, 2015) (stating that Turkey would exercise the inherent right to self-defence based on the unwilling or unable test).

272. *See* Corten, *supra* note 241, at 777.

273. *See* Permanent Rep. of the U.S. to the U.N., Letter dated Sept. 23, 2014 from the Permanent Rep. of the U.S. to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2014/695 (Sept. 23, 2014); Permanent Rep. of Austl. to the U.N., Letter dated Sept. 9, 2015 from the Permanent Rep. of Australia to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2015/693 (Sept. 9, 2015); Chargé d'affaires a.i. of the Permanent Mission of Canada to the U.N., Letter dated Mar. 31, 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Canada to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2015/221 (Mar. 31, 2015); Chargé d'affaires a.i. of the Permanent Mission of Turkey to the U.N., Letter dated July 24, 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Turkey to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2015/563 (July 24, 2015); Corten, *supra* note 241, at 780.

274. Corten, *supra* note 241, at 799.

275. *Id.* at 782.

276. *Id.* at 780.

277. Larsson, *supra* note 206, at 49.